No. 76-6528

In the Supreme Court of the United States

OCTOBER TERM, 1977

DAVID WAYNE BURKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (A. 155–158) is reported at 547 F.2d 968. The opinion of the district court (A. 18–20) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1976. Petitions for rehearing filed by both petitioner and the United States were denied on February 8, 1977 (A. 159–160). The petition for a writ of certiorari was filed on April 11, 1977,[1] and was

[1] The petition was 32 days out of time under Rule 22(2) of the Rules of this Court. Petitioner has offered the explanation that a

granted on June 13, 1977 (A. 161). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause invariably bars a retrial after a court of appeals concludes that the evidence, although sufficient to show commission of the crime, does not adequately establish the defendant's sanity.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

28 U.S.C. 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

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stay of mandate granted by the court of appeals extended the time within which to file a petition. This is incorrect; the time within which to file a petition runs from the entry of judgment or, in this case, from the denial of a petition for rehearing. The critical date is the date on which the judgment becomes final, not the date upon which it becomes effective. *Department of Banking* v. *Pink*, 317 U.S. 264, 266; *Boylan* v. *United States*, 257 U.S. 614; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 149–150. The date on which mandate issues therefore is irrelevant unless the appellate court treats its mandate as its judgment. *Commissioner* v. *Estate of Bedford*, 325 U.S. 283; *Dann* v. *Chatfield*, certiorari denied, October 3, 1977 (No. 76–1559). The Sixth Circuit does not treat its mandate as its judgment, and the petition is therefore untimely. Cf. *Schacht* v. *United States*, 328 U.S. 58, 64 (the time requirements of Rule 22(2) are not jurisdictional and may be relaxed "when the ends of justice so require").

STATEMENT

An indictment returned in the United States District Court for the Middle District of Tennessee charged petitioner with robbing a federally insured bank by use of a dangerous weapon, in violation of 18 U.S.C. 2113(d), and with kidnapping to avoid apprehension for the robbery, in violation of 18 U.S.C. 2113(e) (A. 4–5). Before trial the kidnapping count was dismissed on the government's motion (Tr. 14).

At trial petitioner challenged the sufficiency of the proof of the robbery; his major defense, however, was that he was insane at the time of the robbery. He called three expert witnesses who testified, albeit with differing diagnoses of petitioner's condition, that he "suffered from a mental illness at the time of the bank robbery and that he was substantially incapable of conforming his conduct to the requirements of the law against robbing banks" (A. 155).

The prosecution called two expert witnesses. The first, Dr. R. James Farrer, agreed with two of petitioner's experts that petitioner possessed a "character disorder" and had robbed the bank as a means "to solve inner problems" by getting caught, but he refused to classify petitioner as "mentally ill" (A. 113–116, 122). The second expert, Dr. Denton Buchanan,

also acknowledged that petitioner had a character disorder manifested by an occasional "defiant act," in this case robbing the bank "to get caught, [as] a way of being defiant towards his parents" (A. 128–129, 135, 138). Asked whether in his judgment petitioner had been able on the day of the robbery to "conform his conduct to the rules of society," Dr. Buchanan stated that petitioner's conduct in preparation for the robbery showed that he was "capable of obeying at least some laws but [that] clearly by [his] behavior he did not obey another law" (A. 142–143). Dr. Buchanan explained that petitioner is aggressive but that "[t]here is no indication of a psychotic process at present or the remnants of a previous psychotic reaction. [Petitioner's] intellectual functioning is in the superior range" (A. 126).

Finally, the prosecution produced testimony of eyewitnesses to the robbery, of a taxi driver who had encountered petitioner immediately before the robbery, and of the arresting officers; these witnesses agreed that petitioner appeared to be fully in control of himself at the time of the robbery (A. 23–24, 29; Supp. Tr. 27–29). Petitioner's employment supervisor also testified that, during the weeks preceding the robbery, petitioner had been able to perform the tasks demanded by his job (A. 157).

Before the case was submitted to the jury, the district court invited petitioner to move for a judgment of acquittal; petitioner did so, and the court promptly denied the motion (A. 145). The case was submitted to the jury, which returned a verdict of guilty (A. 154).

Petitioner then filed a motion for a new trial, contending, among other things, that "[t]he evidence was insufficient to support the verdict" (A. 15). Petitioner did not file a motion for a judgment of acquittal, although Fed. R. Crim. P. 29(c) provides that such motions may be filed within seven days of the verdict.

The district court denied the motion for a new trial (A. 18–20). It concluded that the contention "that the evidence was insufficient to support the verdict * * * is utterly without merit" (A. 18). The court sentenced petitioner to 20 years' imprisonment, with immediate eligibility for parole (A. 13–14).

On appeal, petitioner conceded that he robbed the bank as charged (A. 158). The only questions on appeal therefore concerned the insanity defense. The court of appeals concluded that the government's evidence had not "effectively" (A. 157) overcome the *prima facie* showing by petitioner's experts that petitioner was insane at the time of the robbery. The court believed that the prosecution's witnesses, despite having given "detailed accounts of their contacts with [petitioner] and opinions concerning his emotional problems, [had] * * * not express[ed] definite opinions on the precise questions which this court has identified as critical in cases involving the issue of sanity" (A. 157). Because the witnesses had not expressed their opinions on the ultimate questions, the court held, the evidence of sanity was insufficient.

The court observed that petitioner had moved for a new trial because of the insufficiency of the evidence, and it remanded the case for a hearing at which the district court is to determine whether the

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prosecutor has additional evidence to present on the issue of petitioner's sanity (A. 157–158). It instructed the district court to "balanc[e] * * * the equities" at the hearing and either to enter a judgment of acquittal or to set the case for retrial (A. 158).[1] The court of appeals adopted the standards and procedures outlined in *United States* v. *Bass*, 490 F. 2d 846, 852–853 (C.A. 5) (see A. 158):

> [W]e reverse and remand the case to the district court where the defendant will be entitled to a [judgment] of acquittal unless the government presents sufficient additional evidence to carry its burden on the issue of defendant's sanity. * * * If the district court, sitting without the presence of the jury, is satisfied by the government's presentation, it may order a new trial. * * * Even if the government presents additional evidence, the district court may refuse to order a new trial if he finds from the record that the prosecution had the opportunity fully to develop its case or in fact did so at the first trial.

Under this standard petitioner will be exposed to a second trial if (a) the prosecution offers additional evidence sufficient to establish petitioner's sanity, and (b) the prosecution establishes that it did not have the opportunity fully to develop its case at the first trial.

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[1] The court of appeals referred to a "directed verdict * * * of acquittal," but directed verdicts have been abolished. Fed. R. Crim. P. 29(a).

SUMMARY OF ARGUMENT

A. It has long been settled that a defendant may be retried after his conviction has been reversed at his request. *United States* v. *Ball*, 163 U.S. 662. Although a number of rationales have been advanced for this unquestioned rule, the most satisfactory is that second trials often represent the best resolution of whatever conflict there may be between the defendant's interest in avoiding multiple trials and the public interest in obtaining convictions of those guilty of crime. The decision to allow reprosecution "reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single [trial] free from harmful governmental or judicial error." *United States* v. *Jorn*, 400 U.S. 470, 484 (plurality opinion).

B. The conclusion that a second trial represents the fairest resolution of the competing interests is least strong when the evidence is insufficient at the first trial to support a conviction. The Double Jeopardy Clause was designed, in part, to prevent the prosecution from having repeated opportunities to muster enough evidence to convict the defendant. But the Court held in *Bryan* v. *United States*, 338 U.S. 552, that the Double Jeopardy Clause does not prohibit a second trial after a conviction has been reversed for insufficient evidence.

Bryan has been criticized, and to the extent it holds that a defendant uniformly may be tried a second time

after reversal on appeal, it has been undermined by subsequent cases. But the rationale for permitting retrials applies in many cases that might be characterized as reversals for insufficiency of the evidence. Although no rule uniformly permitting retrials is appropriate, neither is a rule uniformly forbidding retrials consistent with the ends of public justice.

C. There is no bright line between insufficiency of the evidence and legal error that would justify a rule uniformly forbidding retrials in the former situation and uniformly permitting it in the latter. In a real sense, decisions about the sufficiency of evidence frequently turn on questions of law. The decision of the prosecutor to present particular evidence and ask particular questions is influenced by his (and the trial court's) understanding of the legal rules governing proof of the offense, so that an appellate finding of evidentiary insufficiency may be intimately intertwined with legal mistakes by the trial participants.

For example, the prosecutor may rely for part of his proof on presumptions and inferences, the propriety of which creates legal questions. The prosecutor and trial court may misunderstand the elements of the offense that need to be proved. "Variance" between pleading and proof can be viewed as either a deficiency in the evidence or as an error in drafting the indictment. The evidence might establish an offense other than that charged in the indictment; that, too, may be only a drafting error. The court may submit the case to the jury on a theory unsupported by the

evidence, although the proof at trial made out the offense charged under the proper theory. A court may improperly exclude relevant evidence, as a result of which the remaining evidence is insufficient. Or a court may erroneously admit evidence and the prosecutor, in reliance on that decision, may elect not to offer other (admissible) evidence that would have established the offense.

In the present case the court of appeals apparently concluded that the government's expert witnesses should have addressed themselves directly to the ultimate issue whether petitioner had substantial capacity to conform his conduct to the requirements of the law. But whether such opinion testimony is required—or whether, instead, jurors may infer such conclusions from the other testimony of the expert witnesses—is as much a legal as a factual question. The defect identified by the court of appeals therefore may have been caused by a mistake of law shared by the prosecutor and the district court rather than by any inability to prove that petitioner had committed the offense.

Even when no legal problem is mingled with the factual insufficiency, significant considerations support recognition of judicial discretion to order a second trial. This Court explained in *United States* v. *Tateo*, 377 U.S. 463, 466, that "it is at least doubtful that appellate courts would be as zealous as they now are in protecting against * * * improprieties at trial * * * if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of

further prosecution." That consideration applies to cases in which the evidence is insufficient no less than to cases in which the trial may have been beset by procedural error. When the sufficiency of the evidence is doubtful, but the appellate court is not convinced that the defendant should be discharged entirely, a remand for a second trial may be the fairest solution for all concerned.

Affirmative defenses such as insanity present special problems in this regard. Sanity is not necessarily an element of the offense, and questions about mental condition may take the trial far afield from the usual questions of factual guilt. When the statutory elements of the offense have been established beyond question, as they have been here (petitioner has conceded that he robbed the bank), and when the evidence addressed to the affirmative defense is strong enough to persuade a jury to convict and to persuade a district court to deny a motion for a judgment of acquittal, it is not unfair to permit a second trial if an appellate court should conclude that the evidence was defective in some respect not perceived at trial.

D. The statute governing further proceedings after a reversal on appeal provides that the appellate court may direct the holding of such further proceedings as are "just" and "appropriate." 28 U.S.C. 2106. We believe that the statute and the Double Jeopardy Clause both establish a test under which the defendant's interests and those of the state must be considered and fairly reconciled. The defendant has an

important interest in avoiding being subjected to repeated trials at which the prosecutor attempts to supply the evidence necessary to support a conviction. But where the defect at the first trial is based upon a mistake of law rather than upon simple factual insufficiency, or where the prosecutor cannot reasonably be faulted for any factual insufficiency, the interest in accurate resolution of criminal charges outweighs the interest of a defendant in avoiding a second trial after conviction at the first.

The ends of public justice should be the guiding criterion. Under the approach we have outlined—an approach that several courts of appeals have adopted [8]—there can be no second trial if the evidence at the first was insufficient *and* there is no good excuse for that insufficiency. A second trial would be appropriate only if (a) it appears that the prosecutor can supply at the second trial the evidence that was missing at the first, and (b) the prosecutor can demonstrate that there was a good reason why the evidence was not presented at the first trial. Under this approach second trials would be the exception, not the rule. But when these conditions are present, second trials serve the ends of public justice and are consistent with the principles of the Double Jeopardy Clause.

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[8] See, *e.g.*, *United States* v. *Wiley*, 517 F. 2d 1212 (C.A. D.C.); *United States* v. *Howard*, 432 F. 2d 1188, 1191 (C.A. 9) (opinion of Ely and Hufstedler, JJ.). See also *United States* v. *Steinberg*, 525 F. 2d 1126, 1134–1135 (C.A. 2) (Friendly, J., concurring). See also note 26, *infra*.

The court of appeals remanded the present case to permit the district court to conduct an inquiry into the ability of the prosecutor to offer sufficient evidence and into the reasons for the deficiency at the first trial. Petitioner will not be tried a second time unless that trial would be in the interest of justice under the principles of *Tateo* and *Jorn*. There is no reason to forbid the district court from making this inquiry, and the judgment of the court of appeals therefore should be affirmed.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT INVARIABLY PROHIBIT THE HOLDING OF A SECOND TRIAL IF THE COURT OF APPEALS CONCLUDES THAT THE INTERESTS OF JUSTICE REQUIRE SUCH A TRIAL AFTER A REVERSAL FOR INSUFFICENT EVIDENCE

A. A SECOND TRIAL ORDINARILY MAY BE HELD AFTER A CONVICTION IS REVERSED ON APPEAL

"At least since 1896, when *United States* v. *Ball*, 163 U.S. 662, was decided, it has been settled that [the Double Jeopardy Clause] imposes no limitations * * * upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside." *North Carolina* v. *Pearce*, 395 U.S. 711, 719–720; emphasis in original. This principle is as old as the Double Jeopardy Clause itself.[4] It is "elementary in

[4] A statement of the rule appears in the congressional debates on the amendment. See 1 Annals of Congress 753 (1789); *United States* v. *Wilson*, 420 U.S. 332, 340–341.

our law" (*Forman* v. *United States*, 361 U.S. 416, 425) and a "well-established part of our constitutional jurisprudence" (*United States* v. *Tateo*, 377 U.S. 463, 465). Perhaps no other principle of double jeopardy law has been stated so often.[5] Its validity has never been seriously questioned.

Several rationales have been advanced for this rule. Some cases explained that a defendant who appeals from a conviction "waives" any double jeopardy objection to a second trial on the offense of which he was convicted. See, *e.g.*, *Trono* v. *United States*, 199 U.S. 521, 533; *Sapir* v. *United States*, 348 U.S. 373, 374 (Douglas, J., concurring). Other cases state that an appeal "continues" the jeopardy of the first trial. See, *e.g.*, *Jeffers* v. *United States*, No. 75–1805, decided June 16, 1977, plurality slip op. 14; *Price* v. *Georgia*, 398 U.S. 323, 326. Still others conclude that the propriety of a second trial "rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 721.

[5] See, *e.g.*, *Brown* v. *Ohio*, No. 75–6933, decided June 16, 1977, slip op. 4 n. 5; *Jeffers* v. *United States*, No. 75–1805, decided June 16, 1977, plurality slip op. 14; *Abney* v. *United States*, No. 75–6521, decided June 9, 1977, slip op. 14; *Ludwig* v. *Massachusetts*, 427 U.S. 618, 630–632; *United States* v. *Dinitz*, 424 U.S. 600, 610 n. 13; *Breed* v. *Jones*, 421 U.S. 519, 534; *Price* v. *Georgia*, 398 U.S. 323, 326, 329 n. 4; *United States* v. *Ewell*, 383 U.S. 116, 121–125; *Green* v. *United States*, 355 U.S. 184, 189; *Stroud* v. *United States*, 251 U.S. 15, 16–18; *Murphy* v. *Massachusetts*, 177 U.S. 155, 158–159.

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All of these explanations are open to criticism,[6] and although we do not entirely discount them, a "more satisfactory explanation" must be sought elsewhere. *Breed* v. *Jones,* 421 U.S. 519, 534; *United States* v. *Wilson,* 420 U.S. 332, 344 n. 11. The best explanation "lies in [an] analysis of the respective interests involved" (*Breed* v. *Jones, supra,* 421 U.S. 534); the practical justification for generally allowing a second trial after the first conviction has been reversed is simply that it is fairer to everyone involved. As the Court explained in *United States* v. *Tateo, supra,* 377 U.S. at 466:

> [O]f greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they

[6] The waiver analysis was largely rejected by *Green* v. *United States*, 355 U.S. 184, 191–198. Cf. *United States* v. *Dinitz*, *supra* (the propriety of a second trial after a defendant moves for a mistrial does not depend on "waiver"). The "continuing jeopardy" analysis has been rejected in other contexts. See *United States* v. *Wilson*, *supra*, 420 U.S. at 351–353. Finally, the "clean slate" analysis may be only a restatement of the waiver argument.

> now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interests.

The question of retrial after reversal usually arises when a defendant whose factual guilt has been established by sufficient evidence asserts that, for some reason, the factfinding process was unfair or unreliable or that a pretrial error undermined his conviction. In these cases it is entirely reasonable to remand the case to give the defendant what he was denied before—a procedurally adequate trial. A second trial following a reversal of a conviction gives the accused what he asserted he was denied, and it does not offer the prosecutor a chance to obtain a more favorable verdict from a second factfinder after failing with the first. "The determination to allow reprosecution in these circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decision-making resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error." *United States* v. *Jorn,* 400 U.S. 470, 484 (plurality opinion).[7]

[7] A second trial after conviction and reversal does not jeopardize the defendant's "valued right to have his trial completed by a particular tribunal" (*Wade* v. *Hunter*, 336 U.S. 684, 689) or deprive a defendant of his "option to go to the jury and, perhaps, end the

Petitioner contends, however, that the justifications for holding a second trial are inadequate when a defendant contends that the evidence was insufficient to support a conviction. When a motion for a judgment of acquittal is erroneously denied, petitioner argues, the defendant *is* deprived of his chance to end the dispute then and there with an acquittal. Moreover, at a second trial the prosecutor will have "another, more favorable opportunity to convict the accused" (*Gori* v. *United States,* 367 U.S. 364, 369) and will be able to try to "do better a second time" (*Brock* v. *North Carolina,* 344 U.S. 424, 429 (Frankfurter, J., concurring)). Petitioner contends that these were exactly the dangers against which the Double Jeopardy Clause was designed to protect, and that when a court of appeals concludes that the evidence was insufficient to support a conviction, it has no choice but to enter a final judgment of acquittal.

These arguments for distinguishing evidentiary insufficiency from legal errors are strong ones. For the reasons that follow, however, we do not believe that they justify the creation of a rigid rule invariably prohibiting second trials after reversals for insufficiency of the evidence.

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dispute then and there with an acquittal" (*United States* v. *Jorn*, *supra*, 400 U.S. at 484). This case went to the jury, which found petitioner guilty. The defendant in such cases has not been deprived of any options; there is no need to speculate about what the jury at the first trial would have done. The special problems that arise when a trial is terminated prior to verdict therefore do not pertain to the present case.

B. THIS COURT HAS ALLOWED SECOND TRIALS AFTER REVERSALS FOR INSUFFICIENCY OF THE EVIDENCE

Before the creation of the courts of appeals, certain criminal convictions could be appealed directly to this Court. It was this Court's practice, after concluding that the evidence of guilt was insufficient, to remand the case for a second trial. See, *e.g., Wiborg* v. *United States,* 163 U.S. 632; *Clyatt* v. *United States,* 197 U.S. 207.

This Court held in *Bryan* v. *United States,* 338 U.S. 552, that this practice comported with the Double Jeopardy Clause and was authorized by 28 U.S.C. 2106, which gives appellate courts the power to direct on remand the holding of any further proceedings that may be "just" and "appropriate." In *Bryan* a conviction had been reversed because the evidence was insufficient. This Court concluded that another trial should be held for several reasons: because the evidentiary question was very close, because the missing evidence could be supplied at a second trial, and because a "new trial was one of the remedies which petitioner sought" (338 U.S. at 560). It then rejected the argument that such a trial would be constitutionally impermissible, pointing out that the defendant "sought and obtained the reversal of his conviction" (*ibid.*), a circumstance that always had been deemed to remove any double jeopardy barrier to a second trial.

Bryan was a considered holding.[8] It has been reaffirmed several times. In *Yates* v. *United States,* 354 U.S. 298, 328, the Court, although concluding that it was just to acquit certain defendants against whom the evidence was insufficient, went on to point out that "we would no doubt be justified in refusing to order acquittal even where the evidence might be deemed palpably insufficient, particularly since petitioners have asked * * * for a new trial as well as for acquittal." In *Sapir* v. *United States, supra,* the Court ordered a defendant acquitted because of evidentiary insufficiency, but Mr. Justice Douglas noted in concurrence that the Double Jeopardy Clause would not invariably require such a disposition.[9]

In *Forman* v. *United States, supra,* the Court held that a new trial was appropriate even though no evi-

[8] Petitioner suggests that the double jeopardy issue received only "cursory" attention (Br. 8) because it was discussed in a single paragraph. Yet the extensive briefs of the parties had addressed the double jeopardy issue (see the briefs in No. 178, October Term, 1949: Pet. Br. 16–22, Resp. Br. 7–15, Pet. Reply Br. 2–4), and Mr. Justice Black addressed the question in a concurring opinion.

[9] The brief *per curiam* opinion in *Sapir* does not state the reason for requiring petitioner to be acquitted. The petition for certiorari in that case (Pet. No. 534, October Term, 1954, p. 9) conceded that under *Bryan* the Double Jeopardy Clause did not always forbid a second trial after a reversal for insufficient evidence. Petitioner argued, however, that the court of appeals had considered evidence outside the record in deciding that a second trial should be held (Pet. 7), that the government's request for a new trial was untimely (Pet. 7–9), that petitioner had not asked for a new trial (Pet. 9–10), and that a new trial would be unjust because the prosecutor had a full opportunity to present evidence at the first trial (Pet. 10–12).

dence at all supported the theory on which the case had been submitted to the jury. The Court pointed out that there was ample evidence to convict Forman under a correct theory, that a "new trial * * * was one of petitioner's remedies" (361 U.S. at 425), and that even though Forman had requested an acquittal "the Court of Appeals has full power to go beyond the particular relief sought" (*ibid.*). The Court has continued to cite *Bryan* favorably. See *North Carolina* v. *Pearce, supra,* 395 U.S. at 720, 721 n. 18 ("[w]e think those decisions are entirely sound, and we decline to depart from the concept they reflect"); *United States* v. *Jorn,* 400 U.S. at 492–493 n. 3 (Stewart, J., dissenting).

Bryan has not, however, escaped criticism. Several courts have limited *Bryan* to cases in which the defendant filed a motion for a new trial.[10] Other courts

[10] See, *e.g.*, *United States* v. *Barker*, 558 F. 2d 899 (C.A. 8); *Greene* v. *Massey*, 546 F. 2d 51 (C.A. 5), certiorari granted, June 20, 1977 (No. 76–6617); *United States* v. *Robinson*, 545 F. 2d 301, 305 n. 5 (C.A. 2). See also 2 Wright, *Federal Practice and Procedure: Criminal* § 740 (1969).

Although *Forman* suggested that *Sapir* had established this distinction, that statement may have been based on a misreading of the issues presented in *Sapir*. See note 9, *supra*. In any event, we agree with Mr. Justice Harlan, concurring in *Forman* (361 U.S. at 428), that "the right of an appellate court to order a new trial does not turn on the relief requested by the defendant, and the *Sapir* case does not suggest such a distinction." The motion for a judgment of acquittal and the motion for a new trial serve different functions; a defendant who seeks an acquittal argues that the evidence was absolutely insufficient to convict him, whereas a defendant may ask for a new trial because of trial error or because he seeks to persuade the district court to grant a new

have adopted the approach of Mr. Justice Black in *Bryan* by concluding that a second trial could be held only if there are equitable reasons for doing so.[11] Some courts and commentators have called for the overruling of *Bryan*.[12]

These views are based on the arguments we have outlined at pages 15–16, *supra,* and the essential belief that the prosecution, having failed to introduce sufficient evidence at the first trial, should not be allowed a second opportunity to convict. We, too, believe that these arguments suggest that second trials should be allowed only with caution after a conviction has been reversed for insufficient evidence; we do not, however, believe that a distinction between evidentiary and procedural reversals can or should be drawn that would make second trials uniformly forbidden in the former case and uniformly permitted in the latter.

trial in the interests of justice even though the evidence is marginally sufficient. Under 28 U.S.C. 2106 an appellate court may grant whatever relief is just and appropriate, and "the Court of Appeals has full power to go beyond the particular relief sought" (*Forman*, *supra*, 361 U.S. at 425). The court should be empowered to grant an acquittal even though the defendant asked only for a new trial, and it should be empowered to grant a new trial even if the defendant asked only for an acquittal. A defendant entitled to an acquittal should not be denied that relief just because he also requests a new trial in the event that an appellate court should conclude that an acquittal would be unjustified. The idea that the appellate court is confined to the relief the defendant requested could be supported only on a rigid view of "waiver" of double jeopardy interests that was rejected in *United States* v. *Dinitz*, *supra*. See also *United States* v. *Wiley*, 517 F. 2d 1212, 1217 n. 24 (C.A. D.C.).

[11] See, *e.g.*, *United States* v. *Wiley*, *supra*, 517 F. 2d at 1219–1221 (new trials should be allowed when circumstances beyond the prosecutor's control, including legal error at trial, prevented the introduction of sufficient evidence); *United States* v. *Howard*, 432 F. 2d 1188, 1191 (C.A. 9) (opinion of Ely and Hufstedler, JJ.); *United States* v. *Steinberg*, 525 F. 2d 1126, 1134–1135 (C.A. 2) (Friendly, J., concurring)

[12] See, *e.g.*, *Sumpter* v. *DeGroot*, 552 F. 2d 1206, 1209–1213 (C.A. 7). See also Thompson, *Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal*, 8 Ind. L. Rev. 497 (1975); Comment, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. Chi. L. Rev. 365 (1964).

C. THERE IS NO BRIGHT LINE BETWEEN INSUFFICIENCY OF EVIDENCE AND LEGAL ERROR AT TRIAL

The legal standard that the court of appeals applies in passing on evidentiary arguments is a source of difficult questions. "[T]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States,* 315 U.S. 60, 80. What evidence is "substantial" is difficult to state in the abstract, and the sufficiency of the evidence depends upon the legal definition of the offense. The decision of a court of appeals to reverse a conviction because of "insufficient evidence" rarely involves only a conclusion that proof of an essential fact is missing. In the pages that follow, we discuss some of the reasons that make it impossible to draw any inflexible line between legal and evidentiary problems.

1. Legal and factual issues may be inextricably intertwined

The prosecutor's decision to introduce particular evidence at trial is guided by his understanding of

legal rules. There are many cases in which the prosecutor, the defendant, and the court may have some uncertainty about what the evidence must show in order to be sufficient. For example, federal weapons offenses require proof of an interstate nexus. But it is not always easy to predict which offenses require what proof of interstate travel of weapons or their owners. Compare *United States* v. *Bass,* 404 U.S. 336, with *Scarborough* v. *United States,* No. 75–1344, decided June 6, 1977.

The failure of a prosecutor to introduce particular proof of a sufficient interstate nexus may reflect nothing other than a legal error—shared by the district court—about what the offense involves. The proof submitted to the jury may be sufficient to establish every element of the offense defined by the court's instructions, yet an appellate court could hold that essential evidence was missing. Is this a legal error in the charge to the jury, or is it a factual deficiency amounting to insufficient evidence?

Other problems arise when Congress or the common law provides that one fact may be inferred from another. Inferences are common in criminal trials; intent usually is inferred from objective facts, knowledge is inferred from circumstances, and other elements of the crime also must be proved indirectly. Yet all inferences present problems not only of constitutionality (see *Barnes* v. *United States,* 412 U.S. 837) but also of the adequacy of the proof. In *Leary* v. *United States,* 395 U.S. 6, the Court held that a particular

statutory inference was unconstitutional; with the inference removed, the evidence at the trial was insufficient. But relying on the inference in the first place was entirely a legal error, and a second trial was appropriate if the evidence could be supplied in a proper way.[13]

Take another example. An indictment charges a single conspiracy, and the defendant contends that the evidence at trial showed multiple conspiracies. Is this variance, if established, a "failure of proof," or is it a legal error in either (a) drafting the indictment, or (b) introducing *too much* evidence? See *United States* v. *Bertolotti,* 529 F.2d 149, 154, 160 (C.A. 2). Suppose, for any number of reasons, that the court of appeals is convinced that the defendant committed a crime, but not the one charged in the indictment; is such a case a "failure of proof" or an error in deciding what legal theory to put forth in the indictment?

In many cases the prosecutor introduces proof that is more than sufficient to meet the *Glasser* standard,

[13] Similarly, suppose there is a question whether the factfinder may "notice" a particular fact. There may be a question whether the name of a national bank is enough to prove that it is in fact a national bank for purposes of 18 U.S.C. 2113, or whether a jury may notice that lines of the American Telephone and Telegraph Co. cross state borders. In a state prosecution the question arose whether the jury could notice that the defendant, who was present in court, was female (see *Sumpter* v. *DeGroote, supra*). Often the prosecutor fails to offer proof of such things only because he believes (perhaps incorrectly) that the factfinder may take notice of the obvious. It is possible to call these kinds of deficiency "failures of proof," but it would be just as accurate to call them "mistakes of law" shared by the prosecutor and the court.

but the court of appeals later concludes that some portion of that proof should have been excluded—for example, because it was hearsay. The prosecutor may have relied on the district court's legal error in admitting the evidence and, because of that reliance, failed to offer other, admissible evidence that would have been cumulative. In cases of this sort sufficient evidence was admitted in fact, and a second trial should be permitted so that admissible evidence may be substituted for the inadmissible evidence.

2. Even genuine deficiencies in the evidence may be attributable to the defendant or to legal error

The cases we have discussed above are ones in which the evidence submitted to the jury is sufficient to allow the jury to find all of the elements of the offense defined in the court's charge, yet an appellate court later concludes that it was "really" insufficient under a correct legal standard. We believe that all of these cases should be treated, under the standard of *Ball* and *Tateo,* just like any other legal error. A second trial should be permitted if the factual defect can be corrected.

The argument against holding a second trial is strongest when the evidence at trial is insufficient even under the view of the law taken by the trial court. Here, too, however, it is not always simple to isolate factual insufficiency from legal error.

In some cases the prosecutor introduces more than enough evidence to establish the commission of an of-

fense, but the defendant induces the court to give a charge to the jury erroneously requiring the jury to find facts that have not been proved at trial. For example, in *Forman* v. *United States, supra,* the prosecutor introduced evidence that established that Forman and Seijas conspired to evade income taxes. The defendants persuaded the district court that the prosecution was barred by the statute of limitations unless they had entered into a second conspiracy to conceal the first, and the court accordingly instructed the jury that it could convict only if it found a "concealment" conspiracy. That amounted to the direction of a verdict of acquittal, since there was no evidence that there had been such a conspiracy.

The jury convicted the defendants nevertheless. The evidence at the first trial was palpably insufficient to prove the offense that the district court defined for the jury, and the district court (if it believed its own erroneous legal theory) should have entered judgments of acquittal. This Court had no difficulty in concluding, however, that a new trial was just and appropriate under 28 U.S.C. 2106, and consistent with the Double Jeopardy Clause.[14]

[14] As Mr. Justice Whittaker explained, concurring, 361 U.S. at 429, the defendant, "having asked [for] and obtained an erroneous but far more favorable charge than he was entitled to, certainly invited the error, benefited by it, and surely may not be heard to attack it as prejudicial to him" and then assert it as a reason why he may not be tried a second time.

Forman was an extreme case.[15] Other, more common, procedural problems may lead to a failure of proof. A ruling by the trial court may erroneously preclude the introduction of essential probative evidence. The court may, for example, improperly suppress evidence on Fourth Amendment grounds or erroneously conclude that a particular statement does not fall within an exception to the hearsay rule. If the court then grants a mid-trial judgment of acquittal, the Double Jeopardy Clause would bar a second trial.[16] But if the case goes to the jury, and the jury convicts the defendant, the defendant should not thereafter be able to plead the legal error as a reason why he may not be retried. The defendant is not entitled to a "windfall acquittal," because he "acquire[s] no vested right [to] that error."

[15] See also *United States* v. *Cioffi*, 487 F. 2d 492 (C.A. 2), certiorari denied *sub nom. Ciuzio* v. *United States*, 416 U.S. 995, in which the court withdrew from the jury the authority to convict on a legal theory supported by the evidence and submitted the case, instead, on a theory not supported by the evidence. The court of appeals found (487 F. 2d at 501) "no tenable distinction between a case like this where defendants have procured a reversal because the judge submitted the indictment to the jury on a wrong theory and one where they procured a reversal because the judge submitted a defective indictment, as in the classic case of *United States* v. *Ball*, 163 U.S. 662, 672 * * *." Mr. Justice Brennan, dissenting from the denial of certiorari, recognized (416 U.S. at 997) that it was proper to remand for a second trial "although the Government's evidence * * * may have been insufficient * * *." (He argued, however, that there was an implied acquittal on the charge withdrawn from the jury.)

[16] See *United States* v. *Martin Linen Supply Co.*, No. 76–120, decided April 4, 1977; *United States* v. *Fay*, 553 F. 2d 1247 (C.A. 10) (erroneous grant of suppression motion in mid-trial, followed by the entry of a judgment of acquittal).

United States v. *Howard*, 432 F. 2d 1188, 1190 (C.A. 9) (opinion of Madden, J.).[17]

In many cases the deficiency in the prosecution's case may be attributable to the defendant. See, *e.g.*, *United States* v. *Smith*, 437 F. 2d 538 (C.A. 6), in which the prosecution was unable to overcome an insanity defense because the defense had given inadequate notice and the defendant refused to submit to a psychiatric examination. Although the court of appeals reversed the conviction for want of sufficient evidence of sanity, it was both just and constitutionally permissible to remand the case for a second trial at which the prosecution could supply the evidence that was missing at the first trial only because of the defendant's tactics.[18]

[17] In *Howard* the district court, at the urging of the defendant, denied the prosecution the benefit of a statutory presumption, but the jury nevertheless convicted. The court of appeals remanded the case for a second trial despite the fact that the evidence was insufficient without the assistance of the presumption. As Judges Ely and Hufstedler explained in a separate opinion (432 F. 2d at 1191), "the prosecution, through no fault of its own, had been deprived of an advantage to which it was entitled * * *. In these circumstances, its case has not been fully developed, and it cannot be faulted for the deficiency of proof which requires reversal."

[18] See *United States* v. *Wiley*, *supra*, 517 F. 2d at 1221, in which the court of appeals, although critical of *Bryan*, identified situations in which a second trial should be allowed despite insufficient evidence at the first trial: "the Government may [establish the propriety of a second trial] by pointing to unusual circumstances which denied it a fair chance to prove its case. * * * Retrials would also appear permissible, for example, where the Government was prevented from introducing sufficient evidence by an erroneous ruling of the trial judge, improperly excluding or suppressing Government evidence or denying a reasonable motion to reopen its case or to obtain a brief continuance to supply additional evidence."

In all of the cases we have discussed above, a legal error by the court, by the prosecutor, by the defense, or by some combination of them produced a defect in the evidence. Petitioner argues that these and other problems may be put to one side, because in the present case no legal error was responsible for the deficiency in the evidence. This is not necessarily an accurate characterization of this case. The court of appeals reversed petitioner's conviction principally because the expert witnesses for the prosecution did not give their opinions on the ultimate issue of petitioner's sanity (see A. 157). Whether expert witnesses are *required* to testify on the ultimate issue is entirely a legal question, and the defect in the evidence therefore may be related to a legal assumption, shared by the prosecutor and by the district court, that such evidence is unnecessary.[19]

[19] Fed. R. Evid. 704 provides that expert testimony is not "objectionable" because it "embraces an ultimate issue to be decided by the trier of fact." But this is a new rule in federal practice; older cases forbade such testimony. See McCormick, *Handbook of the Law of Evidence* § 12 (Cleary ed. 1972). The jury usually is allowed to infer from the expert's background testimony whether the defendant's mental disease significantly diminished his capacity to obey the law, and we have not discovered any other case holding or implying that the expert witnesses must address this question directly. The court's holding in this regard, to the extent it makes opinion testimony on the ultimate issue indispensible, therefore is a departure from precedent.

Moreover, the court of appeals' holding in this regard appears to take a different approach to insanity issues than does *United States* v. *Dube*, 520 F. 2d 250 (C.A. 1), which held that the evidence of a defendant's sanity may be sufficient even though the prosecution presents no expert witnesses; the *Dube* court concluded that the jury may choose to discount the analysis of the defendant's experts, and that information supplied by lay witnesses may be ample to allow the jury to conclude that the defendant was sane at the time of the crime. *Dube* thus holds that in some cases neither expert witnesses nor testimony on the ultimate issues is necessary.

If the court of appeals in the present case had followed the analysis of *Dube*, it probably would have affirmed petitioner's conviction. This illustrates, we believe, that the court's "evidentiary insufficiency" holding had strong procedural overtones. Any deficiency in the evidence at trial may have been caused by the prosecutor's beliefs about the types of proof that were required. (Although we have not presented this apparent conflict among the courts of appeals as a question for resolution by this Court, we do not thereby concede that the court of appeals resolved the issue correctly in the present case.)

3. An inflexible rule barring retrials would deter appellate courts from giving defendants the benefit of the doubt in close cases

We do not believe that even relatively uncluttered questions of fact can be analyzed in a way that would isolate certain categories of cases in which retrial is never permitted. This Court explained in *United States* v. *Tateo, supra,* 377 U.S. at 466, that "it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at * * * trial * * * if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." That observation applies to cases in which the evidence may be insufficient no less than to cases in which the trial may have been infected by prosecutorial error.

There is no simple device for separating sufficient evidence from insufficient evidence. There are many

cases in which the district judge and a unanimous jury are convinced of the defendant's guilt, yet the court of appeals is skeptical. It is not unusual for a court of appeals to conclude that the evidence of guilt is sufficient "although only by a hair's breadth" (*United States* v. *Lefkowitz*, 284 F. 2d 310, 315 (C.A. 2), or that it is almost (but not quite) sufficient, or that it is technically deficient in an easily remediable way (*e.g., Cook* v. *United States*, 362 F. 2d 548, 549 (C.A. 9). When the evidence is on the borderline between sufficiency and insufficiency, a court might hesitate to declare the evidence deficient if it knew that such a declaration must bring the prosecution to an end.

As a practical matter, it may be essential to allow appellate courts the option of remanding for a second trial in cases where the sufficiency of the evidence is doubtful. When the reviewing court perceives the issue of guilt to be close, a rule forbidding it to remand for another trial would provide substantial incentive to resolve difficult issues in favor of affirmance, lest the guilty go free. The rule allowing retrials permits appellate courts to resolve uncertainties in favor of the defendant without committing themselves to saying the final word on the issue of guilt or innocence.

A remand for a second trial is, in at least some cases, the remedy most consistent with an honest appraisal of the state of the evidence: neither strong

enough to permit the defendant to be convicted, nor weak enough to say with assurance that the evidence does not satisfy the *Glasser* standard. When these difficult cases arise, a remand for a second trial may be by far the fairest solution for all concerned.[20]

This may be such a case. The trial judge and the jury were persuaded of petitioner's sanity. Two expert witnesses testified for the prosecution that petitioner knew what he was doing and had substantial control over his actions, but they did not explicitly state that he could conform his conduct to the requirements of the law on the day in question. The court of appeals observed that at least one lay witness gave testimony

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[20] We do not imply that an appellate court has an essentially unfettered power (similar to that granted to the district courts by Fed. R. Crim. P. 33) to grant new trials in the interests of justice despite the sufficiency of the evidence. *Glasser* provides the proper standard for appellate review. But wherever the line is drawn between sufficient and insufficient evidence, there will be cases very near it on either side, and it is in these difficult cases that the option of ordering a new trial is necesary to facilitate fair resolution.

Moreover, some state appellate courts possess the power to award new trials in the interest of justice despite the sufficiency of the evidence. *Greene* v. *Massey*, *supra*, may involve the exercise of that power by a state court (see *Sosa* v. *State*, 215 So. 2d 736, 737 Fla. Sup. Ct.). In these cases a defendant probably should have the right to insist upon a resolution of the sufficiency question if he would prefer to let the conviction (and the known sentence) stand rather than to subject himself to a second trial; a motion for a new trial reveals that the defendant does not insist upon a final disposition. But once a defendant has opened up the possibility of a remand for a new trial "in the interests of justice," he should not be able to invoke a double jeopardy bar to the trial he requested. See also note 10, *supra*.

establishing that petitioner behaved normally for extended periods, but that this testimony was undermined by an incident related on cross-examination (A. 157). In these circumstances, the court concluded, the evidence had not "effectively" (*ibid.*) overcome the *prima facie* showing of insanity.

The court of appeals' discussion strongly suggests that it found this to be a difficult case, in which it weighed not only the particular testimony but also its "effectiveness." Cases of this sort are excellent examples of cases in which a second trial is a solution preferable to either affirmance of the conviction or outright acquittal.

4. Evidence relating to affirming defenses presents problems unlike those that arise when the proof does not establish one of the elements of the offense

Part of the rationale for allowing a second trial after a conviction has been reversed is that "the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense." *United States* v. *Jorn, supra,* 400 U.S. at 483–484 (plurality opinion). "Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial." *United States* v. *Tateo, supra,* 377 U.S. at 466.

Many sufficiency-of-the-evidence problems arise when the prosecutor neglects or is unable to prove an

element of the offense. In such cases the appellate court is not confronted with a defendant "whose guilt is clear." The failure to prove an element of the offense beyond a reasonable doubt is a constitutional defect (see *In re Winship,* 397 U.S. 358), and when the prosecutor has simply neglected (or been unable) to prove an essential element of the offense, the defendant has a strong argument for an absolute acquittal whether or not the jury has convicted him. But the problem is more difficult where, as here, the prosecutor established all of the elements of the offense beyond a reasonable doubt, and the question on appeal is whether the prosecutor also adequately overcame an affirmative defense.

Petitioner has conceded that he robbed the bank (A. 158). This case therefore involves a defendant "whose guilt is clear" on the statutory elements of the offense. Since the burdens of proving or overcoming affirmative defenses are constitutionally distinct from the prosecutor's burden to prove the elements of the offense,[21] only prudential questions are involved in considering the sufficiency of evidence to overcome an affirmative defense. This Court has held that in federal cases the prosecutor must show beyond a reasonable doubt that the defendant was sane at the time of the offense (*Davis* v. *United States,* 160 U.S. 469); in that sense, sanity is an element of the offense. But the Constitution would be satisfied if Congress put the

[21] See *Patterson* v. *New York*, No. 75–1861, decided June 17, 1977; *Speiser* v. *Randall*, 357 U.S. 513, 523.

burden on defendants to establish insanity (*Leland* v. *Oregon,* 343 U.S. 790; as a constitutional matter, then, sanity and factual guilt are distinct.

Affirmative defenses often take a case well afield from the question whether the defendant committed the offense charged. In the present case, for example, the psychiatrists explored petitioner's childhood development and his ambivalent feelings toward his parents and siblings (e.g., A. 64–69, 77–82, 88). The prosecutor, who must be fully prepared to prove the elements of the offense charged in the indictment, will not always be prepared to overcome whatever questions may be raised by affirmative defenses.

When the elements of the offense have been established beyond question—and when the evidence concerning the affirmative defense is sufficiently strong to persuade a jury to convict and to persuade the district court to deny a motion for a judgment of acquittal—it is not unfair to permit a second trial to be held if an appellate court should later conclude that the evidence was weaker than the district court thought it was. Cases involving failure of proof only on an affirmative defense may be paradigms of cases in which society has an important interest in convicting those who are in fact guilty.

Moreover, when the sufficiency of the proof is questionable only with respect to an affirmative defense such as insanity, it is especially important in difficult cases that courts have the "safety valve" of remanding for a second trial rather than resolving uncertain-

ties in favor of either acquittal or affirmance. That courts generally regard such a disposition as "just" and "appropriate" reflects both (1) the fact that there is little doubt that the defendant committed the acts constituting the crime and (2) the fact that questions of mental competency present such a "Serbonian Bog" [22] that an appellate court cannot be certain that its own evaluation of the defendant's state of mind rests on footing more sure than the jury's evaluation.[23] The resolution of close cases involving imponderables like sanity would not be facilitated by an inflexible rule denying appellate courts the middle ground of ordering a second trial.

The difference between affirmative defenses and other factual questions is illustrated by the fact that some federal courts and many state courts hold bifurcated trials. If a bifurcated trial had been held in the present case, the jury would have found petitioner guilty of the offense charged, and that verdict would stand unimpeached. The jury then would have rejected petitioner's insanity defense; the court of

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[22] *United States* v. *Bass*, 490 F. 2d 846, 851 (C.A. 5).

[23] See, *e.g.*, *Amador Beltran* v. *United States*, 302 F. 2d 48 (C.A. 1); *United States* v. *Wilson*, 399 F. 2d 459, 464 (C.A. 4) (Sobeloff, J., dissenting); *United States* v. *Bass*, *supra*; *United States* v. *Parks*, 460 F. 2d 736 (C.A. 5); *Watkins* v. *United States*, 409 F. 2d 1382 (C.A. 5), certiorari denied, 396 U.S. 921; *United States* v. *Dunn*, 299 F. 2d 548 (C.A. 6); *United States* v. *Barfield*, 405 F. 2d 1209 (C.A. 6); *United States* v. *Smith*, 437 F. 2d 538 (C.A. 6); *United States* v. *McGraw*, 515 F. 2d 758 (C.A. 9); *Julian* v. *United States*, 391 F. 2d 279 (C.A. 9); *Rucker* v. *United States*, 288 F. 2d 146 (C.A. D.C.); *Hopkins* v. *United States*, 275 F. 2d 155 (C.A. D.C.); *Douglas* v. *United States*, 239 F. 2d 52 (C.A. D.C.).

appeals would have reversed only that discrete portion of the jury's findings. If the initial bifurcation would not have violated the Double Jeopardy Clause, there is no convincing reason why further proceedings on the insanity question alone would do so, since the finding of factual guilt would endure.[24] This Court has upheld separate and limited retrials on the issue of disposition (see *Brady* v. *Maryland*, 373 U.S. 83, 88–91), and we believe that further proceedings seeking to achieve the correct resolution of issues raised by an affirmative defense are not necessarily forbidden by the Double Jeopardy Clause.[25]

[24] See *United States* v. *Alvarez*, 519 F. 2d 1036, 1049 (C.A. 3), another insanity case, in which the court of appeals explained that "the double jeopardy clause of the fifth amendment does not bar a retrial after a reversal on appeal so long as there was sufficient evidence persented in the first trial to establish a *prima facie* case (footnote omitted). *Alvarez* permitted a second trial ofter reversal because of defects in the proof of sanity during the second portion of a bifurcated trial. The court concluded, in the exercise of its powers under 28 U.S.C. 2106, that the second trial should involve both the elements of the offense and the issue of sanity, a conclusion that appears to conflict with the practice in the District of Columbia, where a retrial would be limited to the sanity issues. Compare *United States* v. *Wright*, 511 F. 2d 1311 (C.A. D.C.), with *Whalem* v. *United States*, 346 F. 2d 812 (C.A. D.C.). It is unnecessary in the present case to consider the issues that would be presented at the second trial of petitioner, however, in light of his concession that he robbed the bank and the fact that the court of appeals did not specify whether the retrial, if held, should be limited to the isue of sanity. It apparently left that question to be addressed in the first instance by the district court.

[25] Cf. *McGautha* v. *California*, 402 U.S. 183, 208–220, which holds that the Due Process Clause neither requires nor prohibits bifurcated penalty trials.

D. APPELLATE COURTS SHOULD BE PERMITTED TO REQUIRE OR ALLOW SECOND TRIALS WHEN THAT COURSE IS JUST AND REASONABLE

We have discussed the reasons why it is difficult, if not impossible, neatly to categorize the many reasons that may require the reversal of a conviction. Consequently, there is no simple test that would separate cases in which a retrial should be permitted from one in which it should not. We agree with petitioner that if the prosecutor, after a full and fair opportunity to do so, fails to introduce evidence to make out one or more elements of the offense, that should be the end of the case. If the jury nevertheless convicts, the court of appeals should reverse and remand for the entry of a judgment of acquittal.

But cases are not always that simple. When legal and factual problems are intertwined, or when the evidence of guilt is neither obviously sufficient nor obviously deficient, or when legal error prevents the prosecutor from having a full oportunity to present evidence, or when the evidentiary problem concerns only an affirmative defense, it is essential that the courts have the discretion to take a middle ground between acquittal and affirmance.

The appellate courts have exercised this discretion with restraint, concluding that such trials are just and appropriate under 28 U.S.C. 2106 only when one or more of these circumstances occurs. See, *e.g.*, *United States* v. *Wiley*, 517 F. 2d 1212 (C.A. D.C.); *United States* v. *Howard*, 432 F. 2d 1188, 1191 (C.A. 9)

(opinion of Ely and Hufstedler, JJ.). We believe that these cases correctly balance the competing interests of the defendant and the prosecution in concluding that no inflexible rule either forbidding or allowing second trials should be established. A defendant's legitimate double jeopardy interests, as well as his interests in fair treatment, are fully protected by a rule prohibiting retrial when the prosecution inexcusably fails to prove one of the elements of a *prima facie* case and permitting retrial in other situations. This is the aproach that has evolved in the courts of appeals in recent years, and we believe that it is sound.[26]

The disposition of petitioner's case by the court of appeals here is consistent with this approach. The court did not mechanically remand for a new trial; it remanded the case, instead, to permit the prosecutor to outline for the district court what evidence he could offer at a second trial. Even if the prosecutor offers sufficient evidence of sanity, the district court need not allow a second trial if the prosecution had a full

[26] In addition to the cases cited in note 11, *supra*, see *United States* v. *Smith*, 437 F. 2d 538, 542 (C.A. 6); *Dotson* v. *United States*, 440 F. 2d 1224 (C.A. 10); *United States* v. *Snider*, 502 F. 2d 645, 656 (C.A. 4); *United States* v. *Koonce*, 485 F. 2d 374 (C.A. 8). Although these courts have not all formulated the principle in the same way we have expressed it here, we believe that we have distilled the essence of their approach. (To the extent these and other courts find significance in the presence or absence of a motion by the defendant for a new trial, we disagree with their approach for the reasons stated in note 10, *supra*.)

and fair opportunity to develop its case at the first trial (A. 158). In other words, the court of appeals made the propriety of a second trial depend upon a careful balancing of the equities.

The terms of the remand are just and appropriate in this case. See also *Bryan* v. *United States, supra,* 338 U.S. at 560 (Black, J., concurring). If the evidence at the first trial was defective only because of an unexplained prosecutorial lapse or because sufficient evidence was unavailable, this case will come to an end without a second trial. If the deficiency had some other cause, there is no compelling reason why petitioner should not be retried.[27]

[27] The court of appeals did not identify with particularity the deficiencies in the evidence at petitioner's trial (see pages 28, 31–32 and note 19, *supra*), and so it is not possible to predict with confidence whether the prosecutor will be able to prove facts sufficient to satisfy the court of appeals. The prosecutor can offer to ask the expert witnesses the questions that the court of appeals thought were central: whether petitioner "knew" the wrongfulness of his act and whether his mental illness "render[ed] him substantially incapable of conforming his conduct to the requirements of the law" (A. 156). The district court then would be required to decide whether affirmative answers to the first question and negative answers to the second would provide sufficient evidence and, if so, whether it was an excusable mistake for the prosecutor not to have asked those questions at the first trial. If the court found the prosecutor's neglect to be justifiable—perhaps because based on the reasonable, albeit mistaken, belief that such questioning was unnecessary—the court could properly set the case for another trial.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1977.

* The Solicitor General is disqualified in this case.

U.S. GOVERNMENT PRINTING OFFICE: 1977